STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NOS. 2017-370-E, 2017-207-E, and 2017-305-E

Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920	PETITION FOR RECONSIDERATION OF ORDER 2018-112-H

Pursuant to S.C. Code of Regs. R. 103-854, the South Carolina Coastal Conservation League ("CCL") and Southern Alliance for Clean Energy ("SACE") respectfully petition the South Carolina Public Service Commission ("Commission") to review and reconsider Order 2018-112-H (the "Bifurcation Order" or "Order"), in which the Hearing Officer denied the motion to bifurcate the above-captioned consolidated dockets or, in the alternative, to sequence the hearing (the "Motion").

I. Background and Basis for the Motion

South Carolina Electric & Gas Company ("SCE&G") and Dominion Energy, Inc. ("Dominion") (collectively, "the Companies") filed a Joint Application and Petition on January 12, 2018. Buried in an Exhibit of the 690-page Application is their request to recover under the Base Load Review Act roughly $4.5 billion for a project that will never generate a single kilowatt-hour of electricity. The potential fraud delaying SCE&G's decision to abandon construction of V.C. Summer Units 2 and 3 has been the subject of multiple civil and criminal investigations; it has preoccupied the General Assembly and Governor for much of the last year. Yet SCE&G and Dominion's current application asks the Commission to skip over that issue. They have structured their Application in a way that would force the Commission to blindly accept the cost schedule exactly as SCE&G has proposed—with the timeline and $4.5 billion cost outlays presented in Exhibit 13[1]—in order to unlock Dominion merger customer benefits package.

CCL and SACE filed their motion to bifurcate pursuant to S.C. Code of Reg. R. 103-829 in an effort to untangle the prudency decision and treatment of costs associated with the abandoned V.C. Summer Units 2 & 3 Project under the Base Load Review Act from the proposed merger and three alternative cost recovery options (the Merger Customer Benefits Plan, No Customer Benefits Plan, and Base Request, with their associated new rate schedules requested pursuant to S.C. Code Ann. § 58-27-870(F)).

SCE&G abandoned the V.C. Summer project and now seeks recovery of all costs under the Base Load Review Act. The Base Load Review Act, however, limits cost recovery only to prudent costs. The Commission cannot address the proposed merger

[1] Exhibit 13 is updated to reflect costs through December 2017 in Exhibit KRK-1, attached to the Direct Testimony of Kevin R. Kochems.

without first determining what costs, if any, were prudently incurred. It will also be impossible to properly evaluate whether the merger offer is in customers' best interest when there is so much uncertainty about SCANA Corporation's ("SCANA") valuation.

II. Argument

In his Bifurcation Order, Hearing Officer Butler cites three reasons for denying the Motion. First, he states that "the benefits plans under the merger include proposals for rate mitigation for, *inter alia*, abandonment costs incurred by SCE&G. Therefore, the concepts of abandonment and merger are related and clearly constitute requests made pursuant to the Base Load Review Act." Order at 3. As a result, the Order assumes that decisions on both issues must be made by December 21, 2018—the deadline set by the South Carolina General Assembly for Commission dockets "in which requests were made pursuant to the Base Load Review Act." 2018 South Carolina Laws Joint Resolution Ratification No. 285 (S. 0954), § 1.

Second, he states that "procedure proposed by CCL and SACE would be unwieldy, causing confusion and disruption in the hearing process. Discerning what testimony should be presented in what proceeding, or what part of a proceeding would be very difficult, to the point where much of the hearing time could conceivably be occupied with procedural objections." Order at 3.

Third and finally, he states that "no objections were raised at the time of consolidation of the Dockets and establishment of the procedural schedule, and Dominion and SCE&G pre-filed testimony in reliance on that schedule." *Id.* All of these reasons for denial are based on legal error or are extraneous to the question of bifurcation. The

Commission has broad discretion to bifurcate the proceeding and should exercise it for the benefit of SCE&G customers here.

A. The General Assembly's Resolution Allows for Bifurcation and Bifurcation Advances the Legislature's Intent.

Through the Resolution that became law on July 2, 2018, the General Assembly set forth a schedule specifically for Commission dockets "in which requests were made ***pursuant to the Base Load Review Act***." 2018 South Carolina Laws Joint Resolution Ratification No. 285 (S. 0954), § 1 (emphasis added). The language in the resolution therefore allows the Commission to bifurcate Docket Nos. 2018-207-E, 2017-305-E, and 2017-370-E into two distinct dockets: (1) to resolve the Companies' requests made pursuant to the Base Load Review Act set out in South Carolina Code of Laws Title 58, Chapter 33, Article 4, and (2) to resolve the Companies' requests made pursuant to other authorities, *i.e.* the merger.

Dominion and SCE&G have done their best to tie the Commission's hands by making the supposed sweeteners in the Customer Benefits Plan contingent on recovery of their requested costs under the Base Load Review Act. In this way, the Hearing Officer is correct that the abandonment and merger are "related." However, a utility-imposed contingency is not the same thing as a "request pursuant to." The relevant definition of "pursuant to" in this context is: "As authorized by; under <pursuant to Rule 56, the plaintiff moves for summary judgment>.**"** Black's Law Dictionary (10th ed. 2014). The cost recovery options are not "authorized by" the Base Load Review Act. *See Price v. Medicaid Dir.*, 838 F.3d 739, 749 (6th Cir. 2016) ("'Pursuant to' is a narrower term than 'consistent with.' A decision of the Supreme Court, for example, might be consistent with a decision of our court; but none of the Supreme Court's decisions are made 'pursuant to'

ours. 'Pursuant to' means more than mere consistency; it means, in addition, that an action is directed or permitted by the authority by which the action is taken. . . . That assisted-living services are 'consistent with' a service plan, therefore, does not mean that the services were provided 'pursuant to' the plan. To be provided 'pursuant to' a plan, the services must be ***authorized*** by the plan.") (emphasis in original); *Fruitt v. Astrue*, 604 F.3d 1217, 1220 (10th Cir. 2010) (interpreting "pursuant to" in local rule outlining that a party may "seek[] to recover costs against an unsuccessful party pursuant to 28 U.S.C. § 1920 [within 14 days]" as "authorized by; under[,]" such that the deadline applied only to recovery requests made under that code provision).

The Application asks the Commission to do two things: First, approve cost recovery under Section K of the Base Load Review Act. Second, adjust rates under S.C. Code Ann. § 58-27-870(F), ***which is not the Base Load Review Act***. There is nothing in the Base Load Review Act that "authorizes" the three cost recovery options. The Base Load Review Act cannot govern, for example, mitigation of the nuclear project cost outlays through write-offs and tax riders. SCE&G and Dominion know this; it's why they seek approval of the rate mitigation packages under S.C. Code Ann. § 58-27-870(F), which again, is not the Base Load Review Act. As their application and supporting testimony make clear, the Base Load Review Act's relevance to the merger ends with SCE&G and Dominion's request that the Commission adopt Exhibit 13 as the updated and approved capital cost schedule under Base Load Review Act Sections 280(K) and 270(E) (S.C. Code Ann. § 58-33-280(K) and S.C. Code Ann. § 58-33-270(E)). Application at 47-48; Kochems Direct Testimony at 5 lns 1-8. The Customer Benefits Plan, No Merger Benefits Plan, or Base Request take Exhibit 13 as "the starting point for

calculating the amounts to be recovered" and make certain adjustments with write-offs and offsets to arrive at the proposed rate schedules. Kochems Direct Testimony at 6, lns 6-20. Even though the Companies style their Application as requesting approval of each of the three cost recovery plans under the Base Load Review Act,[2] the Base Load Review Act does not, and cannot, govern or authorize them.

Bifurcation affords the Commission and parties more time to fully consider and rule upon the Base Load Review Act requests set out in SCE&G and Dominion's Application according to the timeline set forth in Joint Resolution Ratification No. 285. Then, if necessary after disposition of the first proceeding, the Commission could address the merger and three cost recovery option requests next year. This strategy advances the legislature's intent in enacting the resolution. It would provide a dedicated hearing to resolve the "serious questions [that] have arisen regarding the prudency of incurred costs that have led to rate increases pursuant to the BLRA for the abandoned Project, including SCANA's apparent failure to avoid or minimize costs that should have been avoided or minimized since at least 2011." 2018 South Carolina Laws Joint Resolution Ratification No. 285 (S. 0954). The SCE&G customers paying the highest bills in the country deserve a hearing that allows the Commission to get to the bottom of exactly what

[2] *See, e.g.*, Application at 12 ("The Parties also seek approval of the Customer Benefits Plan under the provisions of S.C. Code Ann. § 58-33-280(K)"); *id*. at 13 ("If the Merger does not close, then SCE&G seeks approval of the No Merger Benefits Plan under the provisions of S.C. Code Ann. § 58-27-870(F), and S.C. Code Ann. § 58-33-280(K). As a final alternative, if the Merger does not close and if the Commission does not approve the No Merger Benefits Plan, SCE&G seeks approval of the Base Request under that same statutory authority."), and *id.* at 13-14 ("Under both the No Merger Benefits Plan and the Base Request, SCE&G seeks a determination that the NND Project costs, which were not reviewed and approved for inclusion in rate recovery in prior revised rates proceedings, . . . are properly included in the cost schedules for the project in abandonment under S.C. Code Ann.§ 58-33-270(E)").

happened with the nuclear project and what costs are properly recoverable. Such a reckoning is necessary to learn from past mistakes.

B. Bifurcation Would Simplify the Proceedings, Rather than Complicate Them, And Failure to Bifurcate Will Result in Prejudice to Parties in the Proceedings and SCE&G Customers.

South Carolina Rules of Civil Procedure Rule 42(b) allows bifurcation to separate out "any issue" to further convenience, avoid prejudice, or promote expedition and economy. And the South Carolina Supreme Court has in fact recognized that bifurcation is particularly useful to "help[] clarify and simplify the issues" in complex cases. *Durham v. Vinson*, 360 S.C. 639, 644–45 n.2, 602 S.E.2d 760, 762 n.2 (2004) (encouraging bifurcation of issues of actual and punitive damages in complex medical malpractice case); *see also Dixon v. CSX Transp., Inc.*, 990 F.2d 1440, 1442-44 (4th Cir. 1993) (interpreting substantively equivalent Fed. R. Civ. P. Rule 42(b) to find that trial judge abused discretion in failing to bifurcate claims where one issue was highly prejudicial and confusing to the resolution the other issue).

The Commission should grant the Motion because, in addition to providing more time to consider SCE&G's Base Load Review Act requests, bifurcation would clarify the issues. Under the Base Load Review Act, the Commission must determine whether SCE&G's decision to abandon was prudent. That involves two issues: (1) the timing and (2) the costs. The Companies' proposal to present the cost recovery plans at the same time that the Commission considers those two issues is an attempt to unduly influence the abandonment decision and gloss over any mismanagement or fraud that may have occurred with the nuclear project by offering a "discount" from the costs in Exhibit 13. The supposed "discount" offered in the merger is irrelevant to whether SCE&G

customers must legally pay Exhibit 13 costs. Under the law, SCE&G customers may owe ***millions or billions of dollars less than*** what is set out in Exhibit 13, regardless of whether Dominion closes the merger. The Commission should first determine how much SCE&G customers owe under the law, setting up a cleaner opportunity to sort through the merits of the various offerings in the three cost recovery plans. It is widely known that some of the discounts—like the Toshiba settlement and benefits of the Tax Cuts and Jobs Act—are already owed to customers, and the Commission will need to carefully consider whether the merger and any purported benefits are in customers' best interest.

The Commission should grant the Motion because bifurcation would also streamline the proceedings. It would reduce the number of witnesses that need to present testimony in the first phase of the proceeding, and it might even obviate the need for a second phase if Dominion decides that it cannot move forward without burdening customers with costs greater than what they are legally obligated to pay under the Base Load Review Act. The Joint Applicants have repeatedly stated that the merger is conditioned upon approval of the customer benefits plan ***as proposed***, which is in turn conditioned upon endorsement of the cost schedule contained in Exhibit 13 ***as proposed***. *See, e.g.*, Application at 2-3. Dominion has also publicly stated that if there are "material changes [to] the grounds" for its proposal[3]—for example, if the Commission finds certain costs related to the V.C. Summer project are imprudent and not recoverable—Dominion

[3] Robert Dalton, *Dominion threatens to leave SCE&G deal if South Carolina lawmakers cut rates*, UtilityDive (Mar. 29, 2018) https://www.utilitydive.com/news/ dominion-threatens-to-leave-sceg-deal-if-south-carolina-lawmakers-cut-rate/520296/; Avery Wilks, *Dominion Threatens to Cancel SCANA Deal, Senators Ready to Slash SCE&G Bills By 13%*, The State (Mar. 28, 2018), https://www.thestate.com/news/ politics-government/politics-columns-blogs/article207161094.html.

will withdraw its proposal.[4] The Companies have made this threat of withdrawal regardless of whether the case proceeds in one consolidated proceeding or with two, so bifurcation has the potential to save the Commission and parties, including Dominion, a substantial amount of time and expense. This use of bifurcation has been endorsed by South Carolina Courts of Appeals. *See The Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 166, 791 S.E.2d 152, 165 (Ct. App. 2016) (bifurcation to save time and expenses of experts); *Stone v. Thompson*, 418 S.C. 599, 605, 795 S.E.2d 49, 52 (Ct. App. 2016), *cert. granted* (Dec. 14, 2017) (bifurcation "to save time and resources on the remaining issues" in second phase of case if controlling issue resolved in first phase); *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 108, 109, 512 S.E.2d 510, 517 (Ct. App. 1998). It is inappropriate to accept at face value SCE&G and Dominion's claim that testimony cannot be separated into two proceedings and that procedural objections will consume the proceedings. *See Porter v. S.C. Public Service Comm'n*, 507 S.E.2d 328, 332, 333 S.C. 12, 20 (1998) (Commission decisions must be supported by substantial evidence; the Commission must explain its reasoning). Several of SCE&G and Dominion's witnesses clearly will not need to participate in a hearing on the prudency of abandonment and resulting ratepayer financial burden for the V.C. Summer Units 2 & 3 project.[5] In fact, it is hard to imagine a scenario

[4] *See also* Addison Direct Testimony at 43-44 (noting conditions of merger closing).

[5] SCE&G has asserted that under bifurcation, witnesses "will have to be called to the stand twice, cross examined twice, and redirected twice[,]" and that it would be difficult to schedule experts and other witnesses. Response at 7. However, most witnesses discuss just one of the two issues proposed to be bifurcated—either the prudency of abandonment and costs to be borne by ratepayers or the merger and three cost recovery plans presented in the application. For example, Witnesses Young and Lynch discuss the prudency of abandonment, while Witnesses Blue, Farrell, Chapman, Hevert, Rooks, Kochems, Lapson, and Griffin discuss the merger and/or cost recovery plans. Those

where ***any*** Dominion witness would participate in a prudency review of how SCE&G's handled the V.C. Summer project. Further, as noted above, the Base Load Review Act prudency of abandonment decision involves just two issues: (1) the timing and (2) the costs. It is difficult to imagine that parties would disrupt the proceeding with continuous objections once the Commission sets out the boundaries for the Base Load Review Act request proceeding, particularly if the Commission employs some of the other tools at its disposal to simplify the issues. *See, e.g.*, S.C. Code of Regs. R. 103-839.

C. It Was Not Possible for CCL and SACE to Raise Objections to the Procedural Schedule in January, and Revelations Since That Time Make the Motion Even More Appropriate.

The Motion to Bifurcate is not untimely. CCL and SACE could not have known six months ago that the General Assembly would pass a Resolution setting forth a timeline and what the scope of the Resolution would be. In fact, the Companies themselves withdrew a petition for reconsideration of scheduling Order No. 2018-80 because they felt certain amendments to Senate Bill 954 would shape the timing of the Commission's final order. CCL and SACE similarly refrained from acting on the Commission's Order until the General Assembly fully set forth the scope of its timing mandate when the Resolution became law in July. It was the Resolution, not any prior order or pleading, that set the timetable for both a hearing and final order on any Base Load Review Act dockets. CCL and SACE's filed their Motion shortly after the

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witnesses that discuss both issues largely refer and defer to the testimony of other witnesses to make their points. For example, Witness Addison refers to the testimony of Witnesses Griffin, Kochems, and Rooks, noting that they provide details on the cost recovery plans and proposed rate riders. Addison Direct Testimony at 44, 46, 47. In addition, courts interpreting the nearly-identical Federal Rule of Civil Procedure have noted that the fact that some witnesses may have to appear twice is "unfortunate," but does not necessarily outweigh the value of bifurcation to the court and other parties. *Ellison v. Rock Hill Printing & Finishing Co.*, 64 F.R.D. 415, 418 (D.S.C. 1974).

Resolution was passed in an effort to advance judicial efficiency by streamline the Base Load Review Act proceeding.

Other revelations since January 2018 make it particularly important for the Commission to carefully review the construction expenditures SCE&G claims it is entitled to under the Base Load Review Act as well as the integrity of certain evidence this Commission relied on in the past to approve increases under the Act. For example, a former top accounting executive at SCANA has accused company officials altering financial numbers prior to a hearing in front of the Commission;[6] SCANA launched an internal probe, joining the state and federal agencies investigations already underway;[7] and now-public records indicate that SCANA officials doubted the schedule estimates they provided to the Commission.[8]

In addition, the South Carolina General Assembly has ordered a fifteen percent rate cut, which a federal judge has allowed to go into effect. 2018 South Carolina Laws Act 258 (H.B. 4375) § 3; *South Carolina Elec. & Gas Co. v. Whitfield et al.*, No. 3:18-CV-01795, 2018 WL 3725742 (D.S.C. Aug. 6, 2018), *appeal filed* (Aug 8, 2018). That same judge has signaled that SCE&G's ability to recover costs for the abandoned V.C.

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[6] Andrew Brown and Thad Moore, *Former SC nuclear project accountant says regulators received altered cost estimates from utility* , The Post & Courier (Jul. 30, 2018), https://www.postandcourier.com/business/former-sc-nuclear-project-accountant-says-regulators-received-altered-cost/article_66d8c638-940c-11e8-bb6e-5b2933e6631d.html.

[7] Thad Moore, *SCANA Recruits Outsiders to Investigate Insiders Over Failed Nuclear Project*, The Post & Courier (July 13, 2018), https://www.postandcourier.com/business/scana-recruits-outsiders-to-investigate-insiders-over-failed-nuclear-project/article_a155bf5e-86e8-11e8-924b-6fd7f252f286.html.

[8] Andrew Brown and Thad Moore, *SCANA Official Openly Doubted Nuclear Project Would Finish On Time, Former Westinghouse Managers Say*, The Post & Courier (May 6, 2018), https://www.postandcourier.com/business/scana-official-openly-doubted-nuclear-project-would-finish-on-time/article_b25ce48e-4dff-11e8-9210-a7619a1687e4.html.

Summer project may be less than the Companies' Application Exhibit 13 calculates they are entitled to. *South Carolina Elec. & Gas Co.*, 2018 WL 3725742, at *11-*14 (noting that SCE&G may not claim an entitlement to certain costs after abandonment because the project is not "constructed or being constructed" and that the Commission has discretion to deny recovery of costs dependent on SCE&G's prudency showing). In other words, according to Judge Childs, SCE&G might not be entitled to any additional costs ***unless*** the Commission finds those costs prudent. Against this backdrop, there seems little certainty the Commission will approve Schedule 13 as proposed. If the Commission approves cost recovery at a much lower lever, Dominion may choose not to close, obviating the need to litigate an SCE&G-Dominion merger before this Commission entirely.

CCL and SACE filed well before the timeliness deadline set out in South Carolina Regulation 108-829(A), and South Carolina courts have bifurcated trials with far less time left before trial. *See, e.g.*, *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 108, 109, 512 S.E.2d 510, 517 (Ct. App. 1998) (judge ordered bifurcation about three weeks before trial). The fact that SCE&G and Dominion have pre-filed testimony does not entitle them to deny the Commission and other parties in this case the opportunity to avoid confusion, streamline the proceedings, and ensure adequate time for consideration on the most consequential matters the Commission is likely to face in a generation. It is never too late to prevent a mistake that has not yet happened and failing to bifurcate these obviously discreet two matters would be a mistake, and a disservice to the Commission and every party and member of the public who seeks clarity and accountability over obfuscation and confusion.

CONCLUSION

For the reasons set forth above, the Commission should grant CCL and SACE's Petition for Reconsideration and issue an order bifurcating the proceeding for consolidated dockets 2017-207-E, 2017-305-E, and 2017-370-E or, in the alternative, an order sequencing the hearing of the consolidated dockets.

Respectfully submitted this 31st day of August, 2018.

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